Supreme Court, U.S.
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No. 03 553

In The

# Supreme Court of the United States

FORUM STEAKHOUSE OF FLORIDA, INC.,

*Petitioner,*

vs.

STROOCK STROOCK & LAVAN, LLP,

*Respondent.*

**On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District**

## PETITION FOR WRIT OF CERTIORARI

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49 pp

## QUESTIONS PRESENTED

1. Can the Florida Courts rule that the allegation of Fraud in the Inducement of the arbitration contract is to be resolved by the arbitrators over the objections of the party to arbitrate and a demand on that issue for a jury trial?

2. Can the Florida Courts rule that a fraudulently obtained arbitration contract does not invalidate an arbitration contract?

3. Can the Florida Courts compel arbitration of claims arising and occurring when no valid Arbitration contract existed?

4. Can the Florida Courts enforce an unconscionable Arbitration clause when all the elements of unconscionability are present?

5. Can the Florida Courts uphold an Arbitration Award when the Arbitration was not conducted in accordance with the Arbitration Rules as agreed to by the parties?

6. Can the Florida Courts render decisions contravening the Federal Arbitration Act?

## LIST OF PARTIES

The parties to the proceedings are Forum Steakhouse of Florida, Inc., petitioner herein and appellant/plaintiff below, and Stroock Stroock & Lavan, L.L.P. with offices in Miami, Florida, respondent herein and appellee/defendant.

## CORPORATE DISCLOSURE

Forum Steakhouse of Florida, Inc. was a duly constitued Florida Corporation. Milton Brodsky was President and shareholder of said corporation, and is now Director for the purposes of finalizing residual corporate business and claims. Forum, Inc. is now defunct.

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Before The American Arbitration Association, Atlanta, Georgia Office. Filed December 29, 1999.

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In The Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. On a Hearing in Chambers Filed May 11, 2001.

In The Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida. Final Order May 17, 2001.

In The Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida. Order Confirming Arbitration Award and Entering Final Judgment. Filed June, 15, 2001

In The District Court of Appeals of Florida. Third District Denying Motion for Rehearing. Filed July 12, 2002

Supreme Court of Florida Decline to Accept Jurisdiction, June 10, 2003

## JURISDICTIONAL STATEMENT

The Judgment of the Third District Court of Appeals for the State of Florida became final on July 12, 2002, when that Court denied Forum's Petition for Rehearing, *per curiam*.

The jurisdiction of this Court is invoked under the Fourteenth Amendment, Sect. 1, United States Constitution and the Federal Arbitration Act, 9 U.S.C.A. §§ 1, *et seq.*, the Florida Arbitration Act, 682.01-22 Fla. Stat., parallels the Federal Act, and 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Sect 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or in force any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The Federal Arbitration Act, 9 U.S.C.A. §§ 1, *et seq.*, provides in part, that, although Arbitration agreements are binding and enforceable, State law on the legality, revocability and enforceability of contracts, generally, as well as State law on contract defenses such as fraud, duress or unconscionability, control questions of validity

where the substantive dispute is based upon state law. The Florida Arbitration Act, 682.01-22 Fla. Stat., parallels the provisions of the Federal Act.

## STATEMENT OF THE CASE

### 1. INTRODUCTION

This Writ of Certiorari is filed on behalf of petitioner Forum Steakhouse of Florida, seeking a vacation of an arbitration award and invalidation of an arbitration contract. This case involves Florida State Courts contravening the Federal Arbitration Act and denying Forum due process of law, under the Fourteenth Amendment.

This is an appeal of an order compelling arbitration, and an Arbitration Award that was upheld by the Eleventh Judicial Circuit Court in and for Miami-Dade County and the Third District Court Of Appeals, Florida. Forum contends that under the laws the case should have never been compelled to arbitration and the 3rd DCA duplicated and perpetuated that error. (1) The arbitration contract was procured by fraud, (2) Forum never agreed to arbitrate its claims, (3) the arbitration contract was unconscionable, (4) that the agreed American Arbitration Association, Rule 19, regarding neutral arbitrators to disclose possible conflicts, and appointed as neutrals was not adhered to by the arbitrators.

Forum challenges the arbitration itself on legal grounds. Therefore only the evidence that led to the objections to arbitrate and testimony from the arbitration hearings, Federal Arbitration Act and Florida Arbitration

Statute 682, and case laws from the Federal and State Appeals Courts and United States Supreme Court are relied upon without going into detail of our Initial Brief.

## 2. DOCUMENTED BACKGROUND

In August of 1996, Forum negotiated a lease and assets purchase from Unicorn restaurant. Unicorn was situated in the rear of the Waterways Shopping Center, Miami, Florida. It was owned by DIM Management and operated by Ross Realty. Conditions of the purchase that Forum could amend the lease, Forum/DIM reached an outline for the amendment.

The lynch pin of the deal was for Forum to have the legal, unequivocal and unencumbered right to erect a tenant's sign at the entrance to the shopping center. That gave the restaurant exposure to all visitors to the area.

It is undisputed, by all, that the signage was crucial to the success of the restaurant. Forum would not enter into any deal or lease agreement without the absolute assurance that it would be legally able to erect tenant's signs.

Forum retained Mitchell C. Fogel, Esq. (August 20, 1996) in connection with the purchase from Unicorn and amendment of the lease with DIM to ensure that Forum had the legal, unequivocal and unencumbered right to erect the tenant's signs at the entrance to the shopping center and all that Forum was buying was legally doable and transferable to Forum.

As a result of certain contract complications with Unicorn, Forum in concurrence with Fogel retained the Stroock Stroock & Lavan, LLP. Stroock was to settle a dispute with the Unicorn and if successful, he was to

review the lease and its amendment that Fogel made with the landlord. Forum told Stroock the same as he told Fogel about the signs. Stroock became the lead attorney, and worked in conjunction with Fogel through the closing. Stroock advised Forum on Oct. 22, 1996 it was okay to close. Forum closed on Oct. 23, 1996.

Forum signed an engagement letter on Oct. 15, 1996. That had a arbitration clause with no specific mention of "malpractice claims." Upon an inquiry by Forum, Stroock said it was for fee disputes.

Forum completed his renovations and opened for business in Dec. 1996. The City of Aventura stated that the signs the landlord permitted in the contract were in fact illegal and ordered Forum to immediately remove them. Consequently Forum closed the business.

DIM sued Forum for eviction and unpaid rent, Forum counter sued DIM for (1) Breach of Lease (2) Fraud in the Inducement (3) Failure To Repair Roof. Forum's attorney in this representation, Darren Rousso, defended a Motion To Dismiss by DIM of the fraud issue based on the economic loss rule. Forum prevailed in that arena. Mr. Rousso left private practice and Forum went to Stroock seeking help. Forum was unaware of the potential malpractice.

Forum faxed Stroock the documents on Sept. 8, 1997 and a "claims analysis" was done by Stroock between Sept. 8th-16th 1997. Stroock was keenly aware that Fogel and itself had committed malpractice. In a response to a question at the arbitration:

> Q. "After reviewing the lease and the amendment, you would have recognized the landlord

certainly had a case that it was not his responsibility to check zoning for the buyer?"

A. "I knew that the first time I saw it." That was Sept. 8th, 1997 (The Stroock bills show they also reviewed the lease and the amendment in Oct. 17th & 18th 1996).

That was not told to Forum, if it had been we would have recognized the malpractice then.

After the "claims analysis" Stroock had Forum execute a new engagement letter, dated Sept. 17, 1997. This also had an arbitration clause but with "specific mention of future legal malpractice claims."

This alerted Forum to inquire 'did you do anything wrong' in relation to our commercial transaction? Stroock answered "they did not" and interjected "that you have a very good breach of contract against the landlord." At this point Forum signed.

Subsequently Stroock testified only new clients sign engagement letters, Forum was not a new client. The Oct. 15, 1996 engagement letter covered the DIM/Forum lawsuit.

The record shows that Stroock also told Forum (during the "claims analysis" period) that the Judge erred in the Motion to Dismiss the fraud issue, and would reverse himself on the Economic Loss Rule. Later, under oath Stroock admitted he misled Forum on that issue.

When Forum subsequently learned from the Judge in open court (with Stroock present) at the end of DIM/Forum trial was that Forum was not legally protected by its lawyers in the transactional stage. The Judge

did not know that Stroock was part of Forum's transactional team.

Subsequently Forum sued Fogel and Stroock for malpractice in the 1996 representation.

Forum also sued Stroock for his second representation, for breach of fiduciary duty, constructive fraud, fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation and malpractice in the second representation, Forum's Verified Amended Complaint. Stroock denied liability, and Forum was forced to sue.

Stroock made a Motion to Compel Arbitration. That hearing is memorialized in a document called "Statement of Proceedings." The Statement of Proceedings meets all genuine issue in that it reflects in whole or part, the basis for the claims. The record is replete with other evidence of fraud.

Stroock presented the first arbitration clause with the Dispute Resolution Procedures attached. The Dispute Resolution Procedures were an attempt to limit a lawyer's liability for malpractice. Forum argued that the arbitration clause contained in the first retainer agreement was not applicable. The Court Agreed. Stroock then said that there was a second retainer agreement, which contained another arbitration clause, Forum's counsel argued, that it had not been produced, was not in our possession and if there was "such a clause" in the second agreement, "it had been procured by fraud."

Stroock objected, to the first 'Statement' draft, states Forum conveniently fails to omit he also argued "unconscionability." Forum amended the Statement and ultimately received judicial approval. The Court sent Forum,

over its objections to arbitration, struck the Dispute Resolution Procedure and left the arbitration contract enforce. The Dispute Resolution Procedures were never seen, reviewed, signed or agreed to by Forum, prior to the Motion to Compel hearing. Arbitration hearing was held and Forum lost in that arena.

Forum filed a Motion to Vacate Arbitration Award. Forum reiterated his claims (1) Fraud in the Inducement of the arbitration clause, (2) It never agreed to arbitrate its claims, (3) the arbitration contract was unconscionable, (4) after the proceedings Forum uncovered that an arbitrator and its firm paid out claims and were sued for numerous malpractice suits and were presently involved in a case of negligent misrepresentation for $1,800,000.00 which was strikingly similar to Forum's. That prejudiced Forum's right to object to seat the arbitrator.

Stroock's written reply to Forum's motion revealed that the arbitrator in question was never neutral and all three arbitrators were non-neutrals. All were appointed to be neutral.

Forum filed a Memorandum of Law, amended its complaint to include that the arbitration was not conducted by the agreed rules. Forum lost at May 11, 2001 hearing, Court denied all of Forum's requests. Forum went to the Third District Court of Appeals of Florida.

## 3. PROCEEDINGS IN THE STATE CIRCUIT COURT.

The 11th Circuit Court's rulings are presented with each of the four issues in Reasons For Granting Writ.

## 4. PROCEEDINGS IN THE STATE COURT OF APPEALS.

The 3rd DCA affirmed the lower Court's ruling on the four issues and gave two opinions that were expressly and directly in conflict with other Appeals Courts.

## 5. PROCEEDINGS IN THE STATE SUPREME COURT.

Forum invoked the discretionary jurisdiction of the Florida Supreme Court citing Rule 9.030(a)(2)(A)(iv) to review a decision of a "District Court of Appeals decision that expressly and directly conflicts with a decision of another District Court of Appeals or of the Supreme Court, on the same question of law." Art. 3(b)(3) Fla. Constitution (1980).

The Supreme Court declined its discretionary jurisdiction, referring to Art. 3(b) of Florida Constitution (1980).

"That expressly addresses a question of law within the four corners of the opinion itself" by "contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests."

The Third District Court of Appeals Decisions are:

> "We find no merit to the appellant's argument ... the arbitration clause was procured by fraud."
>
> "Nor do we find any merit to the appellant's claim that the arbitration panel, or any member thereof, was biased in favor of the appellee."

Forum found those decisions were expressly and directly in conflict with other appeals courts on the same

question of law. And both of the decisions are expressly and directly in conflict with decisions of the United States Supreme Court.

Forum claims it was denied due process of law. The Federal Arbitration Act was contravened by the Florida Courts. American Arbitration Rules and Florida Contract Law were not applied.

Precisely because arbitrations are subject to judicial deference it is imperative that the integrity of the process be zealously guarded. Concerns about the arbitration process are being frequently expressed in the legal community.

Stroock had a fiduciary relationship with Forum which imposed on them duties of utmost good faith, loyalty, honesty and fair dealings. Stroock took the second Forum representation to sue the landlord only because they had in hand ("a get out of jail card") an agreement to arbitrate.

## REASONS FOR GRANTING THE WRIT

This Writ Of Certiorari establishes the bare bone facts relating to the arbitration laws without going into the detail of our Initial Brief.

The following are the *four issues* for granting a writ.

### ISSUE I FRAUD IN THE INDUCEMENT

The Trial Court ruled in this case that was when an arbitration clause was alleged to be fraudulently induced and a jury trial was demanded the

> Florida Courts ruled there is no such entitlement and the issue was to be resolved by the arbitrators; and there is no merit that a fraudulently obtained arbitration contract invalidates the arbitration clause. That decision contravenes Section 4 of the Federal Arbitration Act and a denial to a civil trial.

**Eleventh Circuit Court's Decision.**

> "Lawyers they're supposed to give independent legal advice and not mislead their clients." "I am very disturbed by the precaution list . . . it could have been something that was misleading." "I agree with your clients are very upset they didn't have a jury trial, because the climate now is people aren't too happy with lawyers and judges" . . . and "because the issues are so complex that's its better not to have a jury trial for professional malpractice cases."

**Third District Court of Appeal's Decision.**

> "We find no merit to the appellant's argument that . . . the arbitration clause was procured by fraud." "Affirmed."

Forum always objected to the arbitration, and referred to the Court and demanded a jury trial at May 11, 2001 hearing, quoting Fla. Chap. 682.13(1)(e), "under the rule to vacate." "There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under 682.03." "It never was," Forum stated on the record and was again denied a jury trial on the issue of the fraud induced arbitration clause.

## CONCLUSION

The Court recognized Forum had a genuine issue, ("Forum could have been misled" a issue for a jury determination) and demanded a jury trial on the issue of fraud in making of arbitration clause. The 3rd DCA acknowledged that Forum alleged the arbitration clause "it had been procured by fraud." Trial Court determined that could be resolved by the arbitrators. The 3rd DCA duplicated and perpetuated that error. The 3rd DCA found no merit, "that a fraudulently induced arbitration clause would have negated the arbitration clause."

The decisions by the Court and the 3rd DCA affirming are errors and are diametrically opposed to, and in expressed and direct conflict with a substantial body of well settled case laws to the contrary. The remedy is the Court shall make an order referring issue to a jury. If Forum prevails it reverses the arbitration award and invalidates the arbitration contract. The decision is in express & direct conflict with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 399-400 (1967).

## AUTHORITIES TO ISSUE I

**Federal Arbitration Act, Section 4**

> "If the making of the arbitration agreement . . . be in issue, . . . demand a jury trial, trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury."

**682.13(1)(c) Fla. Chap.**

(1) Upon application of a party, the court shall vacate an award when:

(e) there was no agreement or provisions for arbitration subject to this law, unless the matter was determined in proceedings under 682.03 and unless the party participated in the arbitration hearing without raising the objection.

**Case Laws:**

*Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 399-400 (1967) "The fraud issue is not subject to arbitration." *Adler v. Rimes*, 545 So. 2d 421 (Fla. 4th DCA 1989) "Party had a right to a jury trial to resolve issue." (Citing FAA) *Wick v. Atlantic Marine, Inc.*, 425 F.2d 166 (5th Cir. 1979) "Fraud issue is not subject to arbitration." *Spitz v. Prudential-Bache Securities, Inc.*, 502 So. 2d 479 (Fla. 4th DCA 1987) Sent fraud issue to a jury. Judge Glickstein expressed concern about arbitration. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) held that State Legislatures and State Courts cannot pass laws or render decisions contravening the Federal Arbitration Act. Other panels of State and Federal Courts of Appeals are in accord.

## ISSUE II FORUM NEVER AGREED TO ARBITRATE ITS CLAIMS

The alleged fraudulently induced arbitration contract was enforced against claims that preexisted the contract, without the contract referring to arbitrate preexisting claims. Forum was forced to arbitrate claims that occurred when no arbitration contract existed. The Trial Court's ruling in this case was the Court could reach back to claims unknown to Forum, and could compel arbitration at its discretion without an agreement

to arbitrate. That decision contravenes Section 2 of the Federal Arbitration Act and a denial of a civil trial.

**Eleventh Circuit Court's Decision.**

At a hearing for a Motion to Compel arbitration in a "Statement of Proceedings" the Court denied arbitration on a contract that the claims arose after the contract was made. The Court allowed and upheld the arbitration contract when the claims (six of the seven) arose before a second contract came into existence. The Court was silent on this matter in the rulings at the May 11, 2001 hearing holding to its original ruling.

**Third District Court Of Appeals Decision.**

The Court "Affirmed" but was silent on this matter though it was extensively argued in Forum's Initial Brief, its Reply Brief and its Motion for a Rehearing.

A natural corollary of this rule is that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate.

## CONCLUSION

Based on the indisputable time line that the first malpractice claim arose in Oct. 1996 representation and that five of the other claims arose in the "claims analysis" period of Sept. 8th-16th, 1997 and only the malpractice claim for the second representation arose from the Sept. 17th, 1997 arbitration contract. Being the time when the claims arose there was no valid arbitration contract. Forum could not have made an agreement to arbitrate those preexisting claims, unknown to

them at the time the arbitration contract was made and signed.

Those decisions by the Trial Court and "Affirmed" by the 3rd DCA are errors and are diametrically opposed to and in express and direct conflict with a substantial body of well settled case laws to the contrary. The remedy is to vacate the arbitration award and invalidate the arbitration contract.

## AUTHORITIES TO ISSUE II

**Federal Arbitration Act Section 2**

> "A written provision . . . or a contract evidencing a transaction involving commerce to settle by arbitration . . . or an agreement in writing to submit to arbitration . . . a controversy arising out of such a contract."

**682.13(1)(e) Fla. Chap.**

(1) Upon application of a party, the court shall vacate an award when:

(e) there was no agreement or provision for arbitration subject to this law.

**Case Laws:**

*All American SemiConducter, Inc. v. Unisys Corp.*, 637 So. 2d 59, 60 (Fla. 3rd DCA 1994) "cannot be compelled to arbitrate a dispute which does not arise out of the arbitration clause, the second and distinct agreement." *Miller v. Roberts*, 682 So. 2d 691 (Fla. 5th DCA 1996) "With respect to the terms of the Agreement" did not compel arbitration of tort claims alleging breach of fiduciary duty, fraud and conspiracy. *Tracer Research Corp. v. National Envtl.*

*Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994). Federal policy favoring arbitration "cannot serve to stretch contract beyond the scope originally intended by the parties." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) held that State Legislatures and State Courts cannot pass laws or render decisions contravening the Federal Arbitration Act. Other panels State and Federal Appeals Courts are in accord.

## ISSUE III AN UNCONSCIONABLE ARBITRATION CONTRACT CAN BE DEFEATED

> The Florida Court ruled that even if all the elements are present, withholding of material information, violating the Rules of Professional Conduct, attempt to limit its liability for malpractice, the client uncovers bad faith in taking of the second representation, wrongly places the duty of legal knowledge on the client, the Court recognizes those facts and interprets the law that the arbitration contract is valid. . . . The Federal Arbitration Act provides for State Court's revocation of any contract including an arbitration clause.

**Eleventh Circuit Court's Decision**

> "Court believes that limiting liability or malpractice thing, that you refer client to another lawyer to get a binding limitation of liability, I think that goes to the amount, not the issue whether you're going to have arbitration or a jury trial on the issue of liability malpractice." "As far as the unconscionability, substantive and procedural, I can't see that there was a problem here. The clients could go to another lawyer . . . if they weren't happy the first go-around," "someone with

> with some level of sophistication so I will uphold the original finding the arbitration clause is valid." "Forum could have been misled."

**Third District Court of Appeals Decision.**

> "Affirmed," the Trial Court but was silent, even though Forum argued extensively in its Initial Brief, its Reply Brief and in its Motion for Rehearing.

The Trial Court held and the Third District Court of Appeals "Affirmed" wrongly that an arbitration clause cannot be defeated.

## CONCLUSION

> The Trial Court dismissed the fact that Forum trusted Stroock and had a substantial investment into Stroock's knowledge of the case. The Court also dismissed the fact that "Forum could have been misled," and material information was withheld when the contract was entered. Court dismissed the attempt to limit liability for malpractice. The Court interpreted the Rules of Professional Conduct as not being a protection of a client from an unscrupulous lawyer; the Court also obligates the client of the responsibility of ethical legal sophistication and knowledge and dismisses the lawyers professionalism and deception.

Reversal of the Arbitration Award and invalidating the arbitration contract is the proper remedy.

## AUTHORITIES TO ISSUE III

**Federal Arbitration Act Section 2**

> "Contracts are valid, irrevocable, and enforceable, save on such grounds as exist at law or in equity for the revocation of any contract."

**State Contract Law**

> Relates to the manner in which contract was entered and it involves consideration of such issues as relative bargaining power of the parties and their ability to know and understand the disputed contract terms.

**Rules of Professional Conduct 4-1.8(h)**

> (h) LIMITING LIABILITY FOR MALPRACTICE. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement.

**Case Laws:**

*Powertell v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999) "Thus, an arbitration clause can be defeated by any defense existing under the state law of contracts." "Florida Courts may properly decline to enforce a contract on the ground that it is unconscionable." Id.

Stroock's reliance on *Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d 261 (Cal. Ct. App. 1997) holds "if the lawyer prospectively attempted to limit its liability for malpractice the arbitration clause was invalid."

*Powertell* was a landmark arbitration case regarding an unconscionable contract to arbitrate. Circumstances are very similar to Forum.

## ISSUE IV ARBITRATION WAS CONDUCTED OUTSIDE THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION

A compelled arbitration was held. There were written rules to the arbitration. The appointed neutral arbitrators admittedly, after the proceedings, did not follow those rules yet the arbitration award was upheld by the Trial Court and affirmed by the 3rd DCA. Also a neutral arbitrator failed to disclose acts of possible non-neutrality. That contravenes Section 5 of the Federal Arbitration Act which requires arbitrators and arbitrations be conducted within the rules of arbitration.

### Eleventh Circuit Court's Decision

"I think you should have gone to Justice England and had him check his conscious and review the situation and decide if he really could be fair. You could have done that with each and every lawyer on the panel, not just Justice England." "I really don't think the issue of Justice England's lack of disclosure is sufficiently corrupting or despicable.".

### Third District Court Of Appeals Decision

"Nor do we find any merit to the appellant's claim that the arbitration panel, or any member thereof, was biased in favor of the appellee." "Affirmed."

Non-disclosure and concealment of the Arbitrators' non-neutral status, and the ongoing involvement of one Arbitrator in particular, as a defendant in a case strikingly similar to *Forum v. Stroock*, and not adhering to the

arbitration rules, prejudiced Forum of its right to object and to have a fair hearing under the agreed rules.

## CONCLUSION

> The Trial Court acknowledged that England failed to disclose possible non-neutral acts. The Court also recognized that England and the other arbitrators were concealing the fact of their non-neutrality. The Trial Court put the burden of discovery upon Forum when, procedurally Arbitrators were obligated to disclose facts relating to possible non-neutrality. The Third District Court of Appeals found that proof of 'bias' is a prerequisite of Forum's right to object. That is in express and direct conflict with the United States Supreme Court on the same question of law. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149, 150 (1968).

Those decisions by the Trial Court and "affirmed" by the 3rd DCA are errors and are in conflict with a well settled body of State and Federal case law to the contrary. The remedy is to vacate the Arbitration Award.

The above situation regarding concealment of non-neutrality should be investigated for the public's concern regarding binding arbitration hearing.

## AUTHORITIES TO ISSUE IV

**Federal Arbitration Act Section 5**

> "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed;

**Affidavit of American Arbitration Association By Commercial Supervisor of Florida.**

> "All three arbitrators appointed in the Arbitration were neutral and subject to the disclosure and removal provisions contained in Rule 19 of the Rules."

**682.04 Fla. Chap.**

> "If an agreement or provision for arbitration subject to this law provides a method for appointment of arbitrators or an umpire, this method shall be followed."

**682.13(1)(a)(b) Fla. Chap.**

> (1) Upon application of a party, the court shall vacate and award when:
>
> (a) "The award was procured by corruption, fraud or other undue means."
>
> (b) "There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party."

**Case Laws:**

*Commonwealth Coatings Corp v. Continental Casualty Co.*, 393 U.S. 145, 149, 150 (1968) a neutral arbitrator has the affirmative duty to disclose information creating an appearance that of a possible non-neutrality. The actual presence or absence of bias was immaterial. The fatal error in the process was deprivation of the victimized party's right to object to the appointment of that Arbitrator(s). "The party challenging the arbitrator need not show actual bias or improper motives." "[A]ny tribunal permitted by law to try cases and controversies not only must be

unbiased but also avoid even the appearance of bias." Id. At 150. *Austin v. Stovall*, 475 So. 2d 1014 (Fla. 3rd DCA 1985). The arbitrators were not chosen pursuant to manner set forth in the parties agreement." The remedy was reversal. *Davis Cattle Co. v. Great Western Sugar Co.*, 393 F. Supp. 165, 1179 (D. Colo. 1975) aff'd, 544 F.2d 436 (10th Cir. 1976), cert. denied, 429 U.S. 1094 (1977) "where there is a clear violation of the arbitration contract, the award is void. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) held that State Legislatures and State Courts cannot pass laws or render decisions contravening the Federal Arbitration Act. *Matter of Goldfinger v. Lisker*, 68 N.Y. 2d 225, 230, 508 N.Y.S. 2d 159, 500 N.E. 2d 857 (Ct. App. 1986). "Precisely because arbitration awards are subject to judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously guarded." Other panels of State and Federal Courts of Appeals are in accord.

## CONCLUSION

For the reasons in our *four issues*, the petition for writ of certiorari should be granted, the judgement of the 11th Judicial Circuit Court and affirmed by the Third District Court of Appeals vacated and, the case remanded as is demanded by the Federal Arbitration Act to refer issue of (1) fraud in the inducement of the arbitration clause to a jury and, (2) vacate the arbitration award and invalidate the arbitration contract that Forum indeed by law, did not agree to arbitrate its claims and, (3) the arbitration contract by its very being, under the law, was unconscionable and should vacate the arbitration award and invalidate the arbitration contract and, (4) vacate the

Arbitration Award as the arbitration itself is not conforming to agreed rules of conducting the arbitration. In light of applicable statutes and of this court's decisions in *Commonwealth Coatings Corp. v. Continental Guarantee Co.*, 393 U.S. 145, 149, 150 (1968) and *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 399-400 (1967) and other courts' decisions as presented as precedent, on the same questions of law favoring Forum's positions. Forum should be granted what he was denied, a jury trial on its Verified Amended Complaint.

Furthermore invoking the Fourteenth Amendment, Section 1, United States Constitution, a State cannot deny any person within its jurisdiction due process of law.

*ISSUE I.* Forum demanded a jury trial on the issue of fraud induced the arbitration agreement "upon such demand court shall make an order referring issue to a jury." Denied due process of law.

*ISSUE II.* Forum was compelled to arbitrate claims it never agreed to arbitrate and that by statute and other case laws was not enforceable. Denied due process of law.

*ISSUE III.* Forum was compelled to arbitrate even though by law and other cases the contract should have been deemed unconscionable. Denied due process of law.

*ISSUE IV.* The Eleventh Judicial Circuit Court and the Third District Court of Appeals in light of the statutes, this court's and other court's decisions on the same questions of laws favoring Forum's positions in the arbitration proceedings, Denied due process of law.

Forum was indeed deprived of its constitutional right as in the Fourteenth Amendment, Section 1 and this court should grant the writ.

Respectfully submitted,

ANDREW WILKENS
*Counsel of Record*
University Commerce Park
3474 Alaidon Parkway
Suite 600
Okemos, Michigan 48864
(517) 381-0481

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM A.D. 2002

| | | |
|---|---|---|
| FORUM STEAKHOUSE OF FLORIDA, INC., et al., | ** | |
| Appellant, | ** | CASE NO. 3D01-1674 |
| vs. | ** | |
| STROOCK & STROOCK & LAVAN, LLP | ** | LOWER TRIBUNAL NO. 98-11905 |
| Appellee. | ** | |

Opinion filed May 22, 2002.

An Appeal from the Circuit Court for Dade County, Celeste Hardee Muir, Judge.

Diane H. Tutt, for appellant.

Stroock & Stroock & Lavan and Richard Simring, for appellee.

Before JORGENSON and GERSTEN, JJ., and NESBITT, Senior Judge.

PER CURIAM.

Forum Steakhouse ("Forum") the plaintiff below, appeals from the final judgment; an order compelling arbitration; an order denying its motion to vacate arbitration award; and on order granting an arbitrator's motion for protective order. We affirm.

We find no merit to the appellant's argument that the engagement letter or the arbitration clause was procured by fraud. Nor do we find any merit to the appellant's claim that the arbitration panel, or any member thereof, was biased in favor of the appellee.

**AFFIRMED**.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY FLORIDA

CIVIL DIVISION

CASE NO. 98-11905 CA (15)

FORUM STEAKHOUSE OF
FLORIDA, INC., a Florida
corporation, and LARRY
BRODSKY, an individual,

Plaintiffs,

vs.

MITCHELL C. FOGEL, P.A.
a Florida professional association
and MITCHELL C. FOGEL, ESQUIRE,
an individual STROOCK & STROOCK
& LAVAN, LLP, a Florida limited
liability partnership,

Defendants.

_____/

**ORDER ON MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS**

THIS CAUSE was heard before this Court on Friday, October 2, 1998 on Defendant, STROOCK & STROOCK & LAVAN, LLP's Motion to Compel Arbitration and to Stay Proceedings. The Court, having considered the motion and the file in this action and having heard argument of counsel, and otherwise being advised, hereby

ORDERS AND ADJUDGES that:

1. STROOCK & STROOCK & LAVAN LLP's Motion is granted.

2. This action is hereby stayed against STROOCK & STROOCK & LAVAN LLP and FORUM STEAKHOUSE OF FLORIDA, INC. is compelled to arbitrate its claims in accordance with the terms of the American Arbitration Association Rules as set forth in retainer agreements between STROOCK and FORUM.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 8 day of October, 1998.

/s/ Celeste Hardee Muir
Celeste Muir
Circuit Court Judge

Copies furnished to all counsel of record

CELESTE HARDEE MUIR

BEFORE THE AMERICAN
ARBITRATION ASSOCIATION
ATLANTA, GEORGIA OFFICE

COMMERCIAL ARBITRATION

CASE NO. 32 181 00341 98

| | |
|---|---|
| FORUM STEAKHOUSE OF FLORIDA, INC., | ) |
| Claimant, | ) |
| v. | ) |
| STROOCK & STROOCK & LAVAN, L.L.P., | ) |
| Respondent. | ) |

**FINAL ORDER**
**ON**
**LIABILITY ISSUES**

This matter came before the panel of arbitrators for final hearing on the claims of Forum Steakhouse of Florida, Inc. against Stroock & Stroock & Lavan, L.L.P. for legal malpractice (Count II of Forum's Amended Verified Complaining) and for related acts of misconduct (Counts III, V, VI, VII, VIII of Forum's Amended Verified Complaint).[1] Pursuant to mutual agreement, the parties did not present testimony or evidence on the issue of Forum's damages, or on the issues of Stroock's

[1] All claims against individuals were withdrawn by mutual agreement of the parties prior to commencement of the hearings, and Count IV of the Amended Verified Complaint was withdrawn voluntarily by claimant with concurrence of a trial on September 17, 1999.

counterclaims, pending a determination of whether Stroock is liable to Forum on the claims contained in the Amended Verified Complaint.

The panel has heard testimony and received evidence from the parties and from their witnesses, has heard argument from counsel for the parties, has reviewed hearing transcript excerpts presented by the parties, and has had the benefit of pre-hearing and post-hearing memoranda submitted by counsel for the parties. Based on the record of these proceedings and applicable law, and being fully informed, the panel finds:

1. that Forum is not entitled to any relief against Stroock with respect to the allegations contained in the Verified Amended Complaint; and

2. that Stroock is not liable to Forum on any of the claims presented in the Amended Verified Complaint. Accordingly, no trial on damages for these claims is appropriate or required.

Stroock is directed to advise the panel, within 10 days of the date of this order, whether it intends to pursue its counterclaim for unpaid legal fees and quantum meruit. In the event that further proceedings on either or both of those issues is sought, then Stroock is also directed to advise the panel of the amount of time estimated for a trial on the issue or issues to be presented.

Both parties are directed to advise the panel, within 10 days of the date of this order, whether there are any unresolved issues which will require the panel's attention *other than* those designated by Stroock with respect

to its counterclaim. If the parties advise after the 10-day period that no further action is required of the panel, then this proceeding shall be deemed closed pursuant to AAA Rule 37.

IT IS SO ORDERED.

Dated: December 29, 1999

/s/ Arthur J. England, Jr.
Arthur J. England, Jr., Esq.
Chairman

/s/ William T. England
William T. England, Esq.

Arbitrator Harnett concurs in the decision of his co-panelists, *except* that he would find for Forum on its claim that Stroock breached its fiduciary duty to Forum when it assumed the litigation representation in 1997 without adequate prior disclosure of its potential conflict of interest.

/s/ Bertram Harnett
Bertram Harnett, Esq.

cc: Counsel of record
Nora Sullivan, AAA case administrator

BEFORE THE AMERICAN
ARBITRATION ASSOCIATION
ATLANTA, GEORGIA OFFICE

COMMERCIAL ARBITRATION

CASE NO. 32 181 00341 98

| | |
|---|---|
| FORUM STEAKHOUSE OF FLORIDA, INC., | ) |
| Claimant, | ) |
| v. | ) |
| STROOCK & STROOCK & LAVAN, L.L.P., | ) |
| Respondent. | ) |

## FINAL AWARD

This arbitration proceeding was instituted by Forum Steakhouse of Florida, Inc. through a demand for arbitration filed with the American Arbitration Association. A Final Order on Liability Issues was entered by the panel of arbitrators on December 29, 1999, holding that Forum is not entitled to any relief against Stroock with respect to the allegations contained in the Verified Amended Complaint, and that Stroock is not liable to Forum on any of the claims presented in Forum's Amended Verified Complaint. The cause is now before the panel on a stipulation of the parties with respect to Stroock's counter-claim against Forum for unpaid attorneys fees and quantum meruit.

In accordance with the stipulation of the parties, it is ORDERED AND ADJUDGED that Stroock is entitled to an award of $12,500, inclusive of all attorney's fees

and cost, in full and final settlement of its counter-claim against Forum. The parties have stipulated that Stroock may file a lien for recovery of the amount of this award in the Miami-Dade County Circuit Court proceeding entitled "*Forum Steakhouse of Miami, Inc. v. Mitchell C. Fogel, P.A. et al.*, Case No. 98-11905 CA (15).

The panel has now determined all issues relative to Forum's claims for relief in this arbitration proceeding, and all issues relative to Stroock's counter-claim. There being no further matters properly before the panel, this proceeding is deemed closed pursuant to AAA Rule 37.

Dated: March 1, 2000

/s/ Arthur J. England, Jr.
Arthur J. England, Jr.,
Chairman

/s/ William T. England
William T. England, Esq.

/s/ Bertram Harnett, Esq.
Bertram Harnett, Esq.

cc: All counsel of record
Nora Sullivan, AAA case administrator

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

CASE NO.: 98-11905 CA
GENERAL JURISDICTION DIVISION

FORUM STEAKHOUSE OF FLORIDA,
INC., a Florida corporation, and
LARRY BRODSKY, an individual,

Plaintiffs,

vs.

MITCHELL C. FOGEL, P.A., et al.,

Defendants.

_____/

Dade County Courthouse
73 West Flagler Street,
Miami, Florida,
Friday, 9:53 a.m.,
May 11, 2001.

The above-entitled case came on for hearing before The Honorable Celeste Muir, Circuit Judge, in chambers, pursuant to notice.

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APPEARANCES:

FRIED & ASSOCIATES, P.A., by
HYATT M. FRIED, Esq., of counsel,
Attorneys for Plaintiffs

STROOK, STROOK & LAVAN, L.L.P., by
RICHARD B. SIMRING, Esq., of counsel,
Attorneys for Defendant,
Strook, Strook & Lavan, L.L.P.

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* * *

[53] first time we sat before you.

THE COURT: The Court believes that your position is not analogous to a jury. It's more analogous to a judge's disqualification, and judges are not supposed to be monks or people hidden away in an ivory tower somewhere. They're supposed to have familiarity with the law of malpractice and the law of ethics, and supposed to know when to disclose and when not to disclose. And when Arthur England said, "I have nothing to disclose," he may have been taking a position that I took. I didn't disclose anything about my husband's situation. I've had this case now for how many years?

Even though it's in the judge's immediate family, you still have the duty to know what their business affairs are and make those appropriate disclosures. The Court believes that your clients did the best they could just by objecting to lawyers on the panel. It was an exercise in futility. Obviously, it didn't get them anywhere.

I can certainly sympathize with their point of view and your point of view, that judges should be like lawyers, but we don't have preemptory challenges for judges, although that's been proposed by the ABA and on down. We don't have the same standard for jurors – lawyers – because lawyers are supposed to put aside all their personal feelings and personal situations and be objective and [54] impartial. And even in representing their clients, they're supposed to give independent legal advise and not mislead their clients.

I'm very disturbed about that precaution list. This doesn't look like it was the standard precaution list. The

part about, "Don't discuss the fact that you relied on your attorney to check legality of any issues," it could have been something that was misleading, but the client could have objected and said, "But I did rely on my attorney."

MR. FRIED: That's what the client did do. The client's here, if you want to swear him in.

THE COURT: To Mr. –

MR. FRIED: Maybe you misheard me. They said, "We're not doing that. That's wrong."

THE COURT: Good, but what I'm trying to say is the Court believes that the limiting liability for malpractice thing, that you refer out the client to another lawyer to get a binding limitation of liability, I think that goes as to the amount, not the issue of whether you're going to have an arbitration or a jury trial on the issue of liability for malpractice.

The two lawyers in the case didn't completely waive the right to be sued. They just said you can't have a jury trial. And I agree that your clients, in hindsight, [55] are very upset they didn't have a jury trial, because the climate now is people aren't too happy with lawyers or judges, but the problem is that I don't think this ethical rule covers the form that you had.

I think the arbitration clause which I remember 20 years ago being in a lawyer arbitration committee with the Dade County Bar – it's probably longer than that now – but people were telling the accountants to put arbitration clauses in their fee agreements. A lot of professional groups were saying put the arbitration clause in your fee agreements, because the issues are so complex that it's

better not to have a jury trial for professional malpractice cases.

So I don't think if the Bar wanted to limit legal malpractice cases to jury trial issues, they would have left that gaping loophole here in this conflict of interest rule, and I really don't think the issue of Justice England's lack of disclosure is sufficiently corrupting or despicable.

As far as the unconscionability, substantive and procedural, I can't see that there was a problem here. The clients could go to another lawyer, and if they were dealing in millions of dollars of a restaurant enterprise, if they weren't happy after the first go-around, they should have refused to sign the second agreement.

I think that it's not like we're dealing with a [56] consumer who is not someone with some level of sophistication, so I will uphold the original agreement, finding the arbitration clause is valid.

When I was in criminal court, I followed Judge Davis, and the public defender's office brought in lots of motions to disqualify Judge Davis and asked me to rule on it, but the law in Florida has been forever that there's a common law right to disqualify a judge, but you have to go to that judge.

If you're going to analogize the arbitrators to judges, I think you should have gone to Justice England and had him check his conscious and review the situation and decide if he wanted to consider whether he really could be fair.

You could have done it with each and every lawyer on the panel, not just Justice England. I'm sorry it's been this

long a process for everybody, but I appreciate all your hard work. I enjoyed the arguments.

Would you like me to mark the cases for ID?

MR. FRIED: Yes. Anything I've handed you, the rules and the affidavit.

THE COURT: I'll mark these courtesy copies, the excerpts of the transcripts, the rules of arbitration. I don't have the list of the Greenberg, Traurig cases and I don't have the affidavit from AAA. No objection to that?

* * *

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 98-11905-CA (15)

FORUM STEAKHOUSE OF FLORIDA, INC., a Florida corporation, and LARRY BRODSKY, an individual,

Plaintiffs,

v.

MITCHELL C. FOGEL, P.A., et al.,

Defendants. /

**ORDER**

**THIS CAUSE** came before this Court on Friday, May 11, 2001 on Plaintiff's Verified Motion to Vacate Arbitration Award. The Court, having reviewed the motion, heard arguments of counsel, and being otherwise fully advised in the premises, hereby **ORDERS AND ADJUDGES** that Plaintiff's motion is DENIED for the reasons set forth by the Court on the record at the hearing.

**DONE AND ORDERED** in Chambers at Miami, Miami-Dade County, Florida this 17 day of May, 2001.

/s/ CELESTE HARDEE MUIR
Celeste Muir
Circuit Court Judge

Copies furnished to all counsel of record

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO. 98-11905 CA 15

FORUM STEAKHOUSE OF FLORIDA, INC., a Florida corporation, and LARRY BRODSKY, an individual,

Plaintiffs,

vs.

MITCHELL C. FOGEL, P.A., et al.,

Defendants. /

**ORDER CONFIRMING ARBITRATION AWARD AND ENTERING FINAL JUDGMENT**

THE COURT having previously entered an order on May 17, 2001 denying Plaintiffs' Verified Motion to Vacate Arbitration Award, and there being no other issues which require adjudication by the Court, it is

ORDERED and ADJUDGED that the Arbitration Award is hereby confirmed and judgment is entered in favor of Stroock & Stroock & Lavan, LLP in the sum of $12,500, against Forum Steakhouse of Florida, Inc.

DONE and ORDERED in Chambers, in Miami, Dade County, Florida, this 15 day of June, 2001.

/s/ CELESTE HARDEE MUIR
CIRCUIT COURT JUDGE

cc: Richard B. Simring, Esq.
Hyatt Fried, Esq.
David Pollack, Esq.
Scott Cole, Esq.
Diane H. Tutt, Esq

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 2002
JULY 12, 2002

FORUM STEAKHOUSE OF FLORIDA, INC., ET AL.,
Appellant(s)/Petitioner(s),

vs.

STROOK & STROOK & LAVAN, LLP.,
Appellee(s)/Respondent(s).

CASE NO.: 3D01-1674

LOWER TRIBUNAL NO. 98-11905

Upon consideration, appellant Forum Steakhouse of Florida, Inc.'s motion for rehearing is hereby denied. JORGENSON and GERSTEN, JJ., and NESBITT, Senior Judge, concur.

A True Copy
TEST

/s/ Mary Cay Blanks
Clerk, District Court of
Appeals, Third District

[SEAL]

cc:
Diane H. Tutt
Hyatt M. Fried
Richard B. Simring
David C. Pollack

**Supreme Court of Florida**

TUESDAY, JUNE 10, 2003

**CASE NO.:** SC02-1673
Lower Tribunal No.: 3D01-1674

| | | |
|---|---|---|
| FORUM STEAKHOUSE OF FLORIDA, INC. | vs. | STROOCK & STROOCK & LAVAN, LLP. |
| Petitioner(s) | | Respondent(s) |

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS and BELL, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Clerk, Supreme Court

[SEAL]

tc
Served:

HILLARD FRIED
HON. CELESTE H. MUIR, JUDGE
HON. MARY CAY BLANKS, CLERK
DAVID H. POLLACK
HON. HARVEY RUVIN, CLERK
RICHARD B. SIMRING
ROB SYMBOLUK
HYATT M. FRIED
MILTON BRODSKY